

OFFICE OF THE GENERAL COUNSEL

M E M O R A N D U M

TO: Chief, Dockets Division

FROM: Associate General Counsel, Litigation Division

SUBJECT: Pacific Bell v. FCC & USA, No. 94-1149, Viacom International Inc. v. FCC, No. 94-1152, Viacom International Inc. v. FCC & USA, No. 94-1153 and Freeman Engineering Associates, Inc. v. FCC, No. 94-1155. Filing of two new Petitions for Review and two new Notices of Appeal in the United States Court of Appeals for the District of Columbia Circuit

DATE: March 7, 1994

Docket No(s). Gen. Docket No. 90-314

File No(s). RM-7140, Rm-7175, RM-7618,
PP-6 through PP-10, PP-12, P-13,
PP-15 through PP-20, PP-26, PP-27,
PP-41 through PP-52, PP-54 through 68,
PP-70, PP-72 through PP-78

This is to advise you that Pacific Bell on March 1, 1994, Viacom International Inc. on March 3, 1994, and Freeman Engineering Associates, Inc., filed with the United States Court of Appeals for the District of Columbia Circuit:

☒ Section 402(a) Petitions for Review
☒ Section 402(b) Notices of Appeal

of the following FCC decision: In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, FCC 93-550 released February 3, 1994. Challenges the Commission's Order, whereby several requests for a pioneer's preference for a personal communications service license was denied.

Due to a change in the Communications Act, it will not be necessary to notify the parties of this filing.

The Court has docketed these cases as Nos. 94-1149, 94-1152, 94-1153 and 94-1155 and the attorney assigned to handle the litigation of these cases is James E. Carr.


Daniel M. Armstrong

cc: General Counsel
Office of Public Affairs
Shepard's Citations

for

RECEIVED
U.S. COURT OF APPEALS
94-1149
AFTER-NOON DEPOSITORY

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PACIFIC BELL,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

Case No. 94-1149

Filed: 3/1/94

PETITION FOR REVIEW

Pacific Bell, pursuant to 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342 and 2344, and Rule 15(a) of the Federal Rules of Appellate Procedure, petitions this Court for review of the Third Report and Order of the Federal Communications Commission (the "Commission"), in the matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Gen. Docket No. 90-314, FCC No. 93-550, RM-7140, RM-7175, RM-7618, PP-6 through PP-10, PP-12, PP-13, PP-15 through PP-20, PP-26, PP-27, PP-41 through PP-52, PP-54 through PP-68, PP-70, PP-72 through PP-78 (released February 3, 1994); a synopsis of the order was published in the Federal Register on February 28, 1994. 59 Fed. Reg. 9419.¹ In the order, the Commission granted pioneer's preferences for licenses of 2 GHz personal communications services to three applicants, and denied

¹Because the award of a pioneer's preference is not itself the grant of a license, review under 47 U.S.C. § 402(a) is appropriate rather than appeal under 47 U.S.C. § 402(b). If this Court decides otherwise, Pacific Bell requests that this petition for review be construed as a timely notice of appeal.

the requests of 47 other applicants, including the request of Pacific Bell. Relief is sought on the grounds that the order is arbitrary, capricious and otherwise contrary to law. Venue is proper under 28 U.S.C. § 2343.


Petitioner requests that this Court hold unlawful, vacate, enjoin, and set aside the Commission's order. As made clear in the accompanying motion, petitioner also requests that this case be consolidated with the accompanying petition for review of the Commission's First Report and Order, in the matter of Review of the Pioneer's Preference Rules, ET Docket No. 93-266, FCC No. 93-551 (released January 28, 1994).

Respectfully submitted,

PACIFIC BELL

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Attorneys for Pacific Bell

March 1, 1994

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA **CIRCUIT** 40 71 94

Viacom International Inc.,

Appellant

v.

Federal Communications Commission

Appellee

OFFICE OF
GENERAL COUNSEL

No. 94-

1152

FILED: 3/3/94

NOTICE OF APPEAL

Viacom International Inc. ("Appellant"), pursuant to Section 402(b)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(b)(1), and Rule 15 of the Federal Rules of Appellate Procedure, hereby submits this Notice of Appeal of the Third Report and Order of the Federal Communications Commission ("FCC") in General Docket No. 90-314, released February 3, 1994 (copy attached).^{1/}

STATEMENT OF THE NATURE OF THE PROCEEDING

In the Third Report and Order the FCC denied Appellant's request for a "pioneer's preference" for a personal communications service ("PCS") license. At the same time, the FCC granted a pioneer's preference for a PCS license to three other applicants, none of whose requests were mutually exclusive with that of Appellant.^{2/}

^{1/} In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, FCC 93-550 (released February 3, 1994).

^{2/} It is not clear whether an appeal taken from an FCC denial of a pioneer's preference in General Docket No. 90-314 is properly filed as a Section 402(b) appeal from an FCC denial of
(continued...)

GROUND ON WHICH RELIEF IS SOUGHT

1. The FCC's action denying Appellant's request for a pioneer's preference for a PCS license was arbitrary and capricious, an abuse of discretion, unsupported by substantial evidence, and contrary to established FCC precedent. In particular, the FCC did not adequately explain why the proposals of the three successful applicants are entitled to a pioneer's preference but the proposal of Appellant is not.

2. The FCC misapplied its own criteria in denying Appellant's pioneer's preference request. Specifically, the FCC had stated that proposals that promise to enable the sharing or co-use of allocated spectrum may qualify for a pioneer's

^{2/}(...continued)

an application for a construction permit or license or as a Section 402(a) appeal from an adverse FCC action in an informal rulemaking. In a recent pioneer's preference case where the appellant filed its appeal pursuant to Section 402(a), the FCC raised the possibility that Section 402(b) might be the appropriate jurisdictional provision. See Respondent's Motion to Dismiss at 5, n.7, Adams Telecom, Inc. v. FCC, 997 F.2d 955 (D.C. Cir. 1993) (No. 93-1103). The Court was not required in that case to resolve the issue of which jurisdictional provision applies, and did not do so. In the absence of a final determination of which jurisdictional provision applies, Appellant has filed simultaneously herewith under separate cover a Section 402(a) appeal of the FCC's denial of Appellant's pioneer's preference request in the Third Report and Order, and upon resolution of the issue will dismiss one appeal or the other as deemed necessary by this Court.

preference, yet denied Appellant's request even though it proposed an innovative spectrum-sharing methodology.

Respectfully submitted,

VIACOM INTERNATIONAL INC.

By: 
George H. Shapiro

By: 
Robert D. Primosch

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Its Attorneys

March 3, 1994

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Viacom International Inc.,

Appellant

v.

Federal Communications Commission
and United States of America

Appellees

)
) OFFICE OF
) GENERAL COUNSEL
)
) No. 94- 1153
)
)
)

PETITION FOR REVIEW

Filed 3/3/94

Viacom International Inc. ("Appellant"), pursuant to Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a), and Rule 15 of the Federal Rules of Appellate Procedure, hereby submits this Petition for Review of the Third Report and Order of the Federal Communications Commission ("FCC") in General Docket No. 90-314, released February 3, 1994 (copy attached).^{1/}

STATEMENT OF THE NATURE OF THE PROCEEDING

In the Third Report and Order the FCC denied Appellant's request for a "pioneer's preference" for a personal communications service ("PCS") license. At the same time, the FCC granted a pioneer's preference for a PCS license to three other applicants, none of whose requests were mutually exclusive with that of Appellant.^{2/}

^{1/} In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, FCC 93-550 (released February 3, 1994).

^{2/} It is not clear whether an appeal taken from an FCC denial of a pioneer's preference in General Docket No. 90-314 is properly filed as a Section 402(a) appeal from an adverse FCC (continued...)

FACTS ON WHICH VENUE IS BASED

This Court is the appropriate venue for this action under 47 U.S.C. § 402(a) and 28 U.S.C. § 2343.

GROUND ON WHICH RELIEF IS SOUGHT

1. The FCC's action denying Appellant's request for a pioneer's preference for a PCS license was arbitrary and capricious, an abuse of discretion, unsupported by substantial evidence, and contrary to established FCC precedent. In particular, the FCC did not adequately explain why the proposals of the three successful applicants are entitled to a pioneer's preference but the proposal of Appellant is not.

2. The FCC misapplied its own criteria in denying Appellant's pioneer's preference request. Specifically, the FCC had stated that proposals that promise to enable the sharing or co-use of allocated spectrum may qualify for a pioneer's preference, yet denied Appellant's request even though it proposed an innovative spectrum-sharing methodology.

^{2/}(...continued)

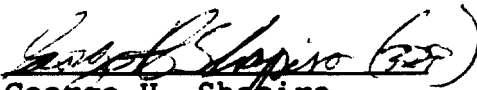
action in an informal rulemaking or as a Section 402(b) appeal from an FCC denial of an application for a construction permit or license. In a recent pioneer's preference case where the appellant filed its appeal pursuant to Section 402(a), the FCC raised the possibility that Section 402(b) might be the appropriate jurisdictional provision. See Respondent's Motion to Dismiss at 5, n.7, Adams Telecom, Inc. v. FCC, 997 F.2d 955 (D.C. Cir. 1993) (No. 93-1103). The Court was not required in that case to resolve the issue of which jurisdictional provision applies, and did not do so. In the absence of a final determination of which jurisdictional provision applies, Appellant has filed simultaneously herewith under separate cover a Section 402(b) appeal of the FCC's denial of Appellant's pioneer's preference request in the Third Report and Order, and upon resolution of the issue will dismiss one appeal or the other as deemed necessary by this Court.

STATEMENT OF REQUESTED RELIEF

Appellant requests that this Court vacate the FCC's denial of Appellant's pioneer's preference request and remand that decision to the FCC for further proceedings, and grant such other and further relief as may be just and proper.

Respectfully submitted,

VIACOM INTERNATIONAL INC.

By: 
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Its Attorneys

March 3, 1994

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Freeman Engineering
Associates, Inc.,

Appellant

v.

Federal Communications
Commission,

Appellee

Case No.

94-1155

Filed: 3/4/94

Notice of Appeal

Freeman Engineering Associates, Inc. ("Freeman"), by its attorneys and pursuant to Section 402(b)(1) of the Communications Act of 1934, as amended ("the Act"), 47 U.S.C. § 402(b)(1), hereby appeals the decision of the Federal Communications Commission ("FCC"), as set forth in Third Report and Order (GEN Docket No. 90-314), FCC 93-550, released February 3, 1994 ("Third R&O") (copy attached), insofar as it denied Freeman's request for a pioneer's preference for a license to provide Personal Communications Services ("PCS") in the 2 GHz frequency band.¹ In support hereof, the

¹ The Third R&O was issued in the rulemaking proceeding in GEN Docket No. 90-314, but deals exclusively with the award of three pioneer's preference requests and the denial of 47 other pioneer's preference requests. This Court has jurisdiction over cases brought under both Section 402(a) and Section 402(b) of the Act. These provisions of the Act are usually mutually exclusive, but in some cases, as here, the subject matter of the FCC action may arguably be subject to either section of the Act. This notice of appeal is timely-filed in either case. The Court has held that under these circumstances, when no party will be prejudiced thereby, it will treat a notice of appeal filed under Section 402(b) of the Act as a petition for review under Section 402(a) of the

following is shown:

1. In the Third R&O, the FCC: a) awarded American Personal Communications, Inc., Cox Enterprises, Inc. and Omnipoint Communications, Inc. pioneer's preferences for 2 GHz band PCS licenses in separate geographic markets; and b) denied the 47 remaining requests for pioneer's preferences (including Freeman's) for 2 GHz band PCS licenses.

2. The FCC's procedures for the award of pioneer's preferences are set forth in Section 1.402 of the FCC's Rules, 47 C.F.R. § 1.402. Under Section 1.402(d) of the FCC's Rules, 47 C.F.R. § 1.402(d), the grant of a pioneer's preference effectively constitutes the grant of a commercial radio station authorization.² Thus, the denial of a request for pioneer's preference constitutes the denial of an application for a construction permit or station license within the meaning of Section 402(b)(1) of the Act.

3. The FCC's action in denying Freeman's request for a pioneer's preference was: a) arbitrary, capricious and an

Act if Section 402(a) of the Act is found to be applicable. Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135, 1136 n.1 (D.C. Cir. 1976).

² 47 C.F.R. § 1.402(d) states that "[i]f awarded, the pioneer's preference will provide that the preference applicant's application for a construction permit or license will not be subject to mutually exclusive applications."

abuse of discretion; b) inconsistent with the requirements of 47 C.F.R. § 1.402; c) inconsistent with the requirements of Section 309 of the Act; and d) inconsistent with the requirements of the Administrative Procedure Act, 5 U.S.C. § 551 et seq.

4. Jurisdiction and venue reside in this Court under Section 402(b) of the Act, 47 U.S.C. § 402(b).

5. Freeman requests that the Third R&O be vacated insofar as it denied Freeman's request for a pioneer's preference, and that the case be remanded to the FCC for further proceedings.

Respectfully submitted,

**Freeman Engineering
Associates, Inc.**

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Dated: March 4, 1994